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Office of Administrative Law Judges
50 Fremont Street, Suite 2100
San Francisco, CA 94105

Date: March 24, 2000

CASE NUMBER: 1999-STA-00029

In the Matter of:

DENNIS L. KELLEY,
Complainant,

v.

HEARTLAND EXPRESS, INC. OF IOWA,
Respondent.

Appearances:
Paul O. Taylor, Esq.,
For Complainant

Douglas R. Richmond, Esq.
Michael L. Matula, Esq.,
For Respondent

Before: ALFRED LINDEMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

A hearing in this matter under section 405 of the Surface Transportation Assistance Act of 1982 ("the Act"), 49 U.S.C. § 2301, *et seq*., 29 C.F.R. §§ 1978.106-1978.109, was held in Kansas City, Missouri, on October 20, 1999, on Complainant's timely filed complaint and his objections to the "Secretary's Findings" dated April 1, 1999.[1/]

Preliminary Matters

[1] *I.e.*, the Secretary found that "Complainant's discharge on November 2, 1998, was not in violation of Section 31105 of the STAA (49 U.S.C. 31101)."

In its response brief,[2/] Respondent argues that Complainant is raising issues in his post-hearing brief which he did not raise before or during the hearing, thus prejudicing Respondent. Specifically, Respondent asserts that Complainant is arguing for the first time that he engaged in "protected activity" when he stopped driving en route from Kentucky to Maryland in order to rest on October 22, 1998, and when he stopped driving while en route from Illinois to Tennessee on October 28, 1998. Respondent contends that it believed, based on the information provided in Complainant's Pre-Hearing Statement, complaint, and interrogatory and deposition answers, that the case focused on only one issue: whether Complainant was fired because he refused a dispatch to Florida allegedly due to fatigue on October 31, 1998.[3/] Because it relied on Complainant's pre-hearing representations, Respondent asserts that it did not develop evidence at trial relating to alleged protected activity

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[2] An Order Granting Request to File Response Brief was issued on January 31, 2000, after submissions of post-hearing trial briefs from both parties. Respondent's Response Brief was received on February 22, 2000; Complainant, however, did not file a response brief.

[3] In Complainant's Pre-Hearing Statement, he listed the following issues: (1) Is the refusal to operate a commercial motor vehicle in violation of 49 C.F.R. § 392.3 a protected activity under the Surface Transportation Assistance Act; (2) Was Complainant's ability and alertness so impaired due to fatigue or likely to become impaired due to fatigue as to make it unsafe for him to operate a commercial motor vehicle on November 1-2, 1998, when he refused to transport a shipment from Fairburn, GA to Whitehouse, FL; (3) Were Complainant's statements to Respondent on October 31, 1998, complaints "related to a violation of a commercial motor vehicle regulation" within the meaning of 49 C.F.R. § 31105(a)(1)(A); and (4) Did Heartland Express, Inc. of Iowa violate Section 405 of the Surface Transportation Assistance Act of 1982 by discharging Dennis L. Kelley on November 2, for engaged in protected activities? *See* Resp. Post Hearing Reply Brief, Exhibit 1.

In his complaint, filed with the assistance of counsel, Complainant asserted that his "refusal to operate a commercial motor vehicle on October 31, 1998, was a protected activity under the Surface Transportation Assistance Act of 1982." He did not assert that his refusal of dispatches on October 22 and 28, 1998, were protected activities. *See* Resp. Post Hearing Reply Brief, Exhibit 2.

Responding to Respondent's interrogatory, which requested that he provide a factual basis for his allegation that Heartland disciplined and terminated him for engaging in protected activities, Complainant stated only that his "refusal to transport the shipment to White House, Florida, the statement to 'Read 392.3,' and the threat to report Heartland to government authorities were protected activities." At his deposition, Complainant agreed that this interrogatory answer was complete regarding what supported his allegation that he was disciplined and terminated for engaging in protected activities. *See* Resp. Post Hearing Reply Brief, Exhibits 3 &4.

occurring on the other two dates. Consequently, Respondent argues that the additional theories of liability should not be considered.

The fundamental elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Courts have found that "[i]t offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing." N.L.R.B. v. H. E. Fletcher Co., 298 F.2d 594, 600 (1st Cir. 1962). Congress has incorporated these notions of due process in the Administrative Procedure Act (hereinafter referred to as the "APA"). Under the APA, "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . matters of *fact* and law asserted." 5 U.S.C. § 554(b) (emphasis added). To satisfy the requirements of due process, an agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Id.* (quoting Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968)). These due process requirements, while expressly applying to federal agency action, also apply to actions and representations of the parties themselves. *See* Wallace v. Brown, 485 F.Supp 77, 79 (S.D. N.Y. 1979) (A party "should not be allowed to jettison a losing argument, perform legal legerdemain, and switch horses in midstream by presenting a novel legal argument that they had ample opportunity to present during the trial"); *see also* Daves v. Payless Cashways, Inc., 661 F.2d 1022, 1025 (5th Cir. 1981) ("While we must give a party a fair chance to present claims and defenses, we must also protect 'a busy district court (from being) imposed upon by the presention of theories seriatim.'").

While I recognize that a complainant's initial complaint should not be construed as a formal legal pleading which may serve to limit a suit, *see* Richter v. Baldwin Associates, 84-ERA-9 (Sec'y Mar. 12, 1986), it is evident that Complainant here made reference to a single protected activity not only in his complaint, but also in his interrogatories, deposition, pre-hearing statement, and at the hearing. At no point, other than in his *post-hearing* brief, did Complainant allege that he had engaged in multiple protected activities for which he was terminated. Courts have struck down similar attempts by other parties to change theories after the hearing, where they have "reassessed the field, decided [their] old argument was lame, and now seek to ride a fresh mount in a new direction." U.S. v. Slade, 980 F.2d 27, 30 (1st Cir. 1992).

Applying the foregoing due process standards to the facts in this case, I find that Respondent would be prejudiced if I considered Complainant's new theories of liability. Respondent was entitled to a clear statement of the theory on which Complainant intended to proceed prior to the post-hearing submissions. For example, since Complainant did not identify the October 22 and 28, 1998, events as alleged protected activity, Respondent had no reason to develop evidence regarding those dates, such as eliciting testimony from the dispatcher or other personnel with whom Complainant may or may not have communicated, or otherwise pursuing additional cross examination regarding Complainant's asserted fatigue and alertness, and the appropriateness of the routes he chose to drive.

I also find that these additional issues were not raised and litigated by the implied consent of the parties, which is only established where it appears that the parties understood the evidence to be aimed at the unpleaded issue, and should not be interpreted as allowing parties to change theories in

midstream. *See* Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 358 (6th Cir. 1992). Here, it is clear that the evidence regarding Complainant's activities on October 22 and 28, 1998, was not presented by Complainant for purposes of establishing that he engaged in protected activities; rather, it was presented by Respondent as evidence of its legitimate reasons for Complainant's termination.

Finally, it is noted that Complainant had ample opportunity to cure any perceived deficiencies in his case by amending the complaint, but has not done so. *See* Stephenson v. NASA, 94-TSC-5 (ALJ June 27, 1994); *see also* Daves v. Payless Cashways, Inc., 661 F.2d 1022 (5th Cir. 1981) ("liberality in pleading does not bestow on a litigant the privilege of neglecting [his] case for a long period of time"). Thus, I conclude that the only issue for determination in this case is whether Complainant engaged in protected activity on October 31, 1998, and whether such activity resulted in his unlawful termination under the Act.

Findings of Fact

It is uncontested that Respondent is a commercial motor carrier engaged in interstate trucking operations; that Complainant was employed as a driver of a commercial motor vehicle within the meaning of the Act; that on November 2, 1998, Respondent discharged the Complainant; that Respondent paid Complainant an average weekly wage of $750.00 during the term of his employment; and that Complainant's wage loss damages were $2,100.00 through the date of hearing (exclusive of costs related to travel time and trial). ALJX-1.[4/]

The factual matters in dispute revolve around the activities of the Complainant and his communications with Respondent from October 21, 1998 to October 22, 1998, and October 26, 1998 to November 2, 1998.

A. October 21 to October 22, 1998: Load From Kentucky to Maryland

Complainant testified that he received a dispatch on October 21, 1998, ordering him to pick up a load for Sears in Louisville, Kentucky, for delivery to Columbia, Maryland, by October 25, 1998. TR 38. On October 22, 1998, while driving to Maryland, Complainant sent a message to dispatch that he would not be able to continue driving because he had not slept for over 60 hours.[5/] At 8:30 p.m. on October 22, 1998, Complainant delivered the load in Maryland. Complainant

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[4] "ALJX," "TR," "JX," and "CX" refer, respectively, to the administrative law judge's exhibit (containing the parties' stipulations), the transcript of the hearing, the joint exhibits presented by Respondent and Complainant, and Complainant's exhibits.

[5] Records, however, reveal that Complainant had logged 47.75 hours in his sleeping berth from October 19 to 21, 1998. *See* JX2:19-21 (copies of Complainant's daily logs, which list the hours he spent in his sleeping berth each day); *see also* TR 180-182 (testimony of Gary King, describing the hours reported by Complainant in his daily logs).

testified that he delivered the load to Maryland on-time according to Sear's regulations, but admitted on cross-examination that he was late according to the order sent by the dispatcher. TR 123. In addition, Complainant admitted that at his deposition, he testified that he delivered the load to Maryland eight-hours late. TR 110, 125.

David Hartline, a witness for Respondent, testified that he instructed Complainant to deliver the load in Maryland by 12:00 p.m. on October 22, 1998, not October 25, 1998, as Complainant asserts. TR 222, 265. However, Mr. Hartline also admitted that the delivery date, as recorded on the appointment message, was October 25, 1998. TR 250; CX 3. Complainant's failure to deliver the load in Maryland by the scheduled delivery date and time was considered a "service failure" by Respondent. TR 225.

B. October 26 to October 29, 1998: Load from Chicago to Memphis

Complainant testified that on October 26, 1998, he received a dispatch for a "three pick-up" load in Chicago, Illinois, to be driven to Memphis, Tennessee. TR 43, 46. According to Complainant, he was instructed to pick up the first load in Huntley, Illinois, at 11:00 p.m.; however, when Complainant arrived at the shipping facility at 6:00 p.m., he was informed that the facility was closed and would not reopen until 7:00 or 8:00 a.m. the next day. TR 47-48. Thus he sent a message to dispatch relaying the information that the facility was closed and he would pick-up the load the next day. TR 48. On October 27, 1998, Complainant picked-up the load from Huntley, Illinois, at 9:00 a.m., and began driving to the next pick-up in University Park, Illinois, at 10:30 a.m. TR 49. After driving 2.75 hours, Complainant arrived in University Park and picked-up the load. The dispatch order next required Complainant to drive to Chicago and pick-up another load that same day. However, Complainant did not pick-up the load in Chicago on October 27, 1998, because, due to traffic, he did not think that he would arrive in Chicago before the shipping facility closed at 3:00 p.m. TR 52-53. Complainant testified that he picked up the load in Chicago on October 28, 1998 at 9:00 a.m., and his driver logs reveal that he began driving at 1:00 p.m. after the freight was loaded into his truck. TR 54-56; JX 2:28. While on route to Memphis, Complainant realized that he made a mathematical error when he calculated his "on-duty" and "driving hours," and he was 2.25 hours over the 70 hour-maximum on-duty hours allowed under federal law.[6/] Complainant subsequently shut-down his truck and tried to sleep. TR 57-58.

On October 29, 1998, at 10:27 a.m., dispatch sent a message to Complainant asking him why he was not in Memphis. TR 65-66; JX 1:31. Complainant informed dispatch that he had made the mathematical error regarding his hours and estimated that he would arrive in Memphis on October 29, 1998 by 12:30-12:45 p.m. TR 65-66; JX 1:32-36. At 12:12 p.m., Complainant realized that he

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[6] "No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after (1) [h]aving been on duty 70 hours in any period of eight consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week." 49 C.F.R. § 395.3(b) (1999).

made another error in calculating his distance to Memphis, and informed dispatch to add another 1.5 hours to the estimated time of arrival he had previously submitted. TR 68; JX 1:38. At 1:45 p.m. on October 29, 1998, Complainant delivered the load to Memphis, Tennessee. TR 59; JX 2:29.

On cross-examination, Complainant admitted that he was asleep in his truck when the facility at Huntley opened for truck loading. TR 113. In addition, Complainant admitted that he was late delivering the load to Memphis. TR 111.

David Hartline testified that he instructed Complainant to make three pick-ups in the Chicago area and deliver the freight in Memphis, Tennessee on October 29, 1998, at 9:00 a.m.[7/] TR 225. Hartline explained that Complainant never told him that he had any problems with the pick-ups in the Chicago area, TR 227, and he (Hartline) did not know that Complainant was running late until he received an automatic computer message from the truck indicating that Complainant was running late. TR 226. Thereafter, Hartline sent a message, asking Complainant why he was not in Memphis. TR 227; JX 1:31. In response, Complainant sent a message informing Hartline that he made an error when calculating his hours. TR 228. According to Hartline, Complainant never mentioned that there were any problems with traffic or unusually long loading times which caused his lateness in Memphis. TR 228. Hartline thus testified that Complainant's failure to have the freight in Memphis by the scheduled delivery time contributed to his decision to terminate Complainant's employment with Respondent. TR 229. After making this decision, Hartline contacted the service planner for the Memphis area and asked her to assign Complainant a load that would bring him back to the Atlanta area. TR 229-230. Hartline then left the dispatch terminal without telling anyone of his decision to fire Complainant. TR 231-232.

C. October 30 to November 1, 1998: Load from Memphis to Fairburn, Georgia

After delivering the load to Memphis, Complainant was given orders to drive a load from Memphis to Fairburn, Georgia. Complainant testified that on October 29, 1998, at 4:48 p.m., while he was still in Memphis, he sent an "out of hours" message to the dispatch center. TR 68-69; JX 1:40; JX 2:29. At 11:00 p.m., dispatch sent a message to Complainant inquiring whether he could start driving towards Georgia at midnight. JX 1:44. Complainant informed dispatch that he would start driving in the morning, and reminded dispatch that he did not have many hours available to drive. TR 75-76; JX 1:45.

On October 30, 1998, at 6:39 a.m., dispatch sent a message to Complainant instructing him to "get moving." TR 76; JX 1:46. Complainant testified that he did not receive the message because he was sleeping in his truck. TR 76; JX 1:46. At noon, Complainant began driving in Memphis to pick up the freight due in Georgia. JX 2:30. At 4:13 p.m., Complainant sent a message informing the dispatch center that he would not be arriving in Georgia by the 5:00 p.m. deadline. TR 78; JX

[7] The pick-up schedule was as follows: (1) Huntley, Illinois on October 26, 1998, at 11:33 p.m.; (2) University Park, Illinois on October 27, 1998, at 10:00 a.m.; and (3) Metro Chicago, Illinois on October 27, 1998, at 11:00 a.m. TR 225.

1:48. Dispatch told Complainant that his late arrival was not a problem, but instructed him to arrive as soon as possible. TR 78; JX 1:49.

Complainant testified that on October 31, 1998, at 8:53 a.m., he received a message from Russell Greene requesting that he commit to deliver freight from Georgia to White House, Florida. TR 78; JX 1:50. According to Complainant, after he reminded Greene that the truck required servicing, he refused to commit to the delivery because he was "getting too stressed out" and informed Greene that the last time Complainant was at home was September 18, 1998. TR 81-82; JX 1:51, 54. Complainant testified that he then sent a message to Greene stating that he did not believe it was safe for him to drive and that he was worried about getting into an accident. JX 1:56. Twenty minutes later, Complainant received a message from Greene instructing him to deliver the freight in Georgia as planned, rest for the remainder of October 31, 1998, and leave during the afternoon of November 1, 1998, for a delivery in Florida. JX 1:57. The message also stated that Complainant had enough hours available to accomplish the delivery, and if Complainant continued to assert that he could not drive to Florida because of his safety concerns, he should see David Hartline on Monday to discuss his hours. JX 1:57. In addition, Greene assured Complainant that there was nothing illegal or unsafe about the dispatch to Florida. JX 1:57. Complainant testified that he responded to Greene's message by instructing him to "[r]ead 392.3," a federal safety regulation discussing driver fatigue.[8/] TR 87; JX 1:58. After receiving a message from Greene regarding his estimated arrival time in Georgia, Complainant sent the following message: "Do not know ETA[,] but since you all care so little about safety[,] I will file a complaint with the federal highway safety commission and with OSHA also[,] will have them subpenoa [sic] all qcom [QualComm] records of all company drivers for the last 6 months[.]" TR 87-88; JX 1:60. Complainant testified that he sent the message because he believed Respondent was trying to pressure him into accepting the dispatch to Florida when he knew he could not safely drive the load. TR 88.

Greene testified that on October 31, 1998, he planned to dispatch Complainant on a load from Georgia to Whitehouse, Florida, TR 200-201; that Complainant refused to take the load because the truck he was driving needed servicing, and made a comment about his physical and mental condition to drive, TR 201; that he then attempted to map out the trip for Complainant and explained that there was a way for him to drive to Florida that would accommodate his safety concerns, TR 201-202. Further, Greene testified that after realizing that Complainant was not going to accept the dispatch to Florida, Greene instructed Complainant to drive to the terminal and meet with his supervisor on Monday morning. TR 201-202. Greene then left the building and did not return to work on either Sunday or Monday. TR 207-208. In addition, Greene stated that he did not at any time between October 31 and November 2, discuss Complainant's refusal to accept the dispatch to Florida with Hartline. TR 206.

D. November 2, 1998: Termination

[8] *See* note 6 *supra* (providing the text of 29 C.F.R. § 392.3).

Complainant testified that on November 2, 1998, he met with "Mr. Greene" at Respondent's terminal in Georgia. TR 93. According to Complainant, "Mr. Greene" presented him with a termination slip, which Complainant refused to sign because he believed the reasons stated for his termination on the ship were not true. TR 94-95; JX 3. Complainant also testified that Hartline was not present when he was terminated. TR 96. Hartline, on the other hand, testified that when he arrived at the terminal on November 2, 1998, he sent a message to Complainant requesting that he come to the office, and when Complainant arrived, Hartline took him into Greene's office for privacy, TR 234; that once inside, Hartline explained to Complainant that he was being terminated for his two service failures in delivering the Memphis and Maryland freight, TR 235; that Complainant did not respond to his statements and refused to sign the termination slip, TR 236; and that Hartline had not spoken with Greene, and thus was not aware of Complainant's refusal to accept the load to Florida, TR 239. Greene's testimony in this connection was that he was not at the terminal on November 2, 1998, because his wife was having surgery, and that he did not have any role in the termination meeting. TR 207-208. As I found both Greene's and Hartline's testimony entirely credible, I am convinced and find that neither of them knew of the other's communications with Complainant and it was Hartline, not Greene, who met with Complainant on November 2, 1998.

With respect to the termination slip presented to Complainant on November 2, 1998, it stated that he was fired for failing to respond to dispatch inquiries for 33 hours after delivering freight to Louisville, Kentucky. In addition, the slip stated that Complainant delivered a load after the scheduled delivery time because he required rest after not sleeping for over 60 hours, and that he failed to notify dispatch that he was delivering the load to Memphis late until after the scheduled delivery time had passed. JX 3. It is noted in this connection, that on cross examination Complainant admitted that he did not protest that his termination was unfair, or that he was being fired in violation of federal law, nor did he deny the assertion that he had service failures. TR 128.

Conclusions of Law

Once a case has been fully tried on the merits, it is no longer necessary to determine whether a complainant has presented a *prima facie* case. Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia, ARB No. 98-103, ALJ No. 97-STA-30 (ARB July 8, 1998) (once the employer has produced evidence to show that the complainant was subjected to adverse action, such as termination, for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence in establishing that the reason for his discharge was his protected safety complaint. *See* Pike v. Public Storage Companies, Inc., ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999); Ass't Sec'y & Ciotti, *supra*; Waldrep v. Performance Transport, Inc., 93-STA-23 (Sec'y Apr. 6, 1994).

Protected Activity

Under the Act, a complaint need not explicitly mention a commercial vehicle safety standard to be protected. The statute requires only that the complaint "relate " to a violation of a commercial motor vehicle safety standard. Nix v. Nehi-RC Bottling Co., Inc., 84-STA-1 (Sec'y July 13, 1984). Furthermore, internal complaints to management are protected activity under the whistleblower

provision; the complainant, however, must prove by a preponderance of the evidence that he actually made such an internal complaint. Williams v. CMS Transportation Services, Inc., 94-STA-5 (Sec'y Oct. 25, 1995). In addition, it has been held that a threat to enforce motor carrier safety regulations is protected under the STAA's employee protection provision, 49 U.S.C. § 31105(a)(1)(A) (the "complaint" section). Williams v. Carretta Trucking, Inc., 94-STA-7 (Sec'y Feb. 15, 1995).

In the present case, Complainant presented evidence that he made two internal complaints to Respondent on October 31, 1998: first, when Complainant instructed Respondent to "Read 392.3"[9] after he refused to accept a dispatch; and second, when he notified the company that he intended to notify the federal government of safety violations.[10] JX 1:58, 1:60. The first complaint is clearly one which relates to a potential violation of commercial motor vehicle standard, and the second complaint was intended by Complainant as a threat to enforce safety regulations. TR 88-89. Therefore, based on this evidence, I find that the Claimant has established by a preponderance of the evidence that he engaged in protected activity when he made these two internal complaints.

Adverse Action by Respondent

Once Complainant has proven that he engaged in a protected activity, he then must prove by a preponderance of the evidence that Respondent took adverse action against him. Respondent's termination of Complainant's employment on November 2, 1998 was clearly such an adverse action.

Reason for Discharge Was Not Complainant's Protected Safety Complaint

Although Complainant has established that he engaged in protected activity and that Respondent took adverse action against him, he must also demonstrate by a preponderance of the evidence that the reason for his discharge was his protected safety complaint. *See* Pike v. Public Storage Companies, Inc., *supra;* Ass't Sec'y & Ciotti, *supra*; Waldrep v. Performance Transport, Inc., *supra*. Complainant must show either that his protected conduct more likely motivated the employer or that the employer's proffered explanation is incredible. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992).

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[9] "No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. 392.3 (1999).

[10] Complaint specifically informed dispatch that ". . . since you all care so little about safety[,] I will file a complaint with the federal highway safety commission and with OSHA, [and] also will have them subpenoa [sic] all Qcom records of all company drivers for the last 6 months." JX 1:60

As set forth above, the evidence in the present case is that after Complainant made two complaints over the computer dispatch system on October 31, 1998, in response to Greene's request that he commit to a pre-planned dispatch, TR 86-88, he was instructed by Greene to attend a meeting at the Heartland terminal on November 2, 1998, TR 93-94, and that when he arrived at the office, two days later, "Greene" fired him because he failed to respond to a dispatcher for 33 hours and had delivered a load from Sears late to Memphis. TR 94-96.

Based on the credited testimony of Greene and Hartline, however, I disagree with Complainant's conclusion that such chronology (alone) establishes that the reason for the termination was the asserted safety complaints. *See* Bank v. Chicago Grain Trimmers Assoc., Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); N.L.R.B. v. Jacob E. Decker & Sons, 569 F.2d 357, 364 (5th Cir. 1978).

First, it is significant that Greene, the person to whom the complaints were made, testified that he did not play any role in the firing of Complainant, TR 209, and, as found herein, that in fact Greene was not present at the meeting where Complainant was terminated on November 2, 1998. TR 208-209. Second, it is found that Greene never told Hartline that Complainant had made these complaints or refused the dispatch. TR 203, 206-207, 209-210. Third, Hartline's testimony is credited to the effect that he decided to terminate Complainant on October 29, 1998, after the Sears load was delivered late and there was no communication between Complainant and dispatch for more than 33 hours, TR 226, 229-230; that he (Hartline) did not tell anyone about his decision because he feared that someone might inform Complainant of his impending termination before the trucking equipment could be secured, TR 230-232; and that Hartline never spoke with Greene regarding Complainant's refusal to accept a dispatch for safety reasons, nor heard about it from anyone, prior to the termination meeting on November 2, 1998. TR 239.

In summary, therefore, based on the testimony provided by Greene and Hartline, it is clear that Hartline was not aware of Complainant's asserted protected activity when he terminated Complainant on November 2, 1998, and the evidence establishes that Hartline had in fact made his decision to terminate Complainant on October 29, 1998, which was two days prior to any safety-related complaints made by Complainant. The Secretary of Labor has held that where an employer does not have knowledge of the employee's protected conduct, it can not be causally established that the employer's decision to take adverse action was motivated by the employee's protected conduct. Perez v. Guthmiller Trucking Co., 87-STA-13, 25 (Sec'y Dec. 7, 1988).

Accordingly, based on the totality of the record evidence in this case, I find that the decision to terminate Complainant's employment was a disciplinary action dictated by legitimate, non-prohibited considerations and was not in retaliation for any complaint or threat(s) to file a complaint with the federal government regarding safety violations. It is thus concluded that Complainant was not discriminated against under the Act and the complainant must be DISMISSED.

SO ORDERED.

ALFRED LINDEMAN
Administrative Law Judge

San Francisco, California
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NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).